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No. 84-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY, and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In their brief, petitioners demonstrated that the Ninth Circuit erred in holding that the extraordinary remedy of punitive damages was available to plan participants and beneficiaries for fiduciary breach under ERISA. Punitive damages, of course, "are not presumed; they are not the norm; and nowhere in ERISA are they mentioned." *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1216 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). Nor are they mentioned anywhere in ERISA's extensive legislative history. Moreover, ERISA's comprehensive statutory scheme, which includes detailed enforcement provisions, effectively refutes any suggestion that Congress intended

punitive damages to be available. Finally, the decidedly adverse impact that punitive damages would have on the proper functioning of the employee benefit plan system and the federal courts provides further evidence that Congress intended to exclude punitive damages from ERISA's comprehensive regulatory framework. For essentially the same reasons, the Ninth Circuit's ruling that extra-contractual compensatory damages are available under ERISA should be reversed.

In response, respondent Russell concedes that punitive and extra-contractual damages are nowhere mentioned in ERISA or its legislative history. Indeed, beyond a single sentence referring to the "full range of legal and equitable remedies," which appears at several places in the legislative reports, she points to no support whatsoever in the legislative history for her position.[1] Rather, emphasizing that ERISA is a remedial statute designed to protect the interests of participants and beneficiaries, she argues that Congress intended the federal courts to develop a federal common law to further ERISA's policies and that a private right of action for such damage remedies should be judicially implied or "read into" the statute. Alternatively, she suggests that even if this Court were unwilling to find such remedies generally available under ERISA, it should rewrite the statute to include a special private right of action for participants and beneficiaries of single employer plans that are self-

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[1] As demonstrated in petitioners' brief, respondent's reliance on this stateement is misplaced. This statement had its genesis in an earlier version of ERISA which expressly provided a civil action for "legal or equitable" relief to redress breaches of fiduciary duty. *See* S. 4, Section 603, 93d Cong., 1st Sess. (Apr. 18, 1973), *reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, Subcommittee on Labor, Committee on Labor and Public Welfare, United States Senate (April 1976) ("Legislative History") at 579. Ultimately, Congress eliminated all references to "legal" relief, choosing instead to rely solely on equitable remedies. *See* ERISA Section 502, 29 U.S.C. § 1132 (1982).

administered. As demonstrated herein, these contentions cannot withstand close scrutiny.

I. ERISA'S REMEDIAL PURPOSE DOES NOT SUPPORT THE IMPLICATION OF ADDITIONAL REMEDIES UNDER THE STATUTE

Respondent's reliance upon ERISA's remedial purpose to support the implication of additional remedies is wholly misplaced. To be sure, ERISA was designed to protect the interests of plan participants and beneficiaries, and, indeed, the Act's "primary purpose" was the "protection of individual pension rights." H.R. Rep. No. 533, 93d Cong., 2d Sess., *reprinted in* Legislative History at 2348. However, in fashioning its comprehensive reform of the employee benefit plan system, Congress also recognized that such plans required private, voluntary action and that large increases in the cost of maintaining such programs would discourage their continuation and growth. Thus, rather than merely extending protections to participants and beneficiaries, Congress resolved these competing interests in order to craft "a private insurance system that would operate efficiently, thereby increasing its acceptance and institution among American business." *Taylor v. Bakery & Confectionary Union*, 455 F. Supp. 815, 820 (E.D.N.C. 1978).

That Congress sought to minimize the costs to employers of the reforms in the Act is clearly reflected in ERISA's legislative history. As noted by the House Committee on Education and Labor in reporting the Bill:

> [T]he Committee has been constrained to recognize the voluntary nature of private retirement plans. The relative improvements required by this Act have been weighed against the additional burdens to be placed on the system. While modest cost increases are to be anticipated when the Act becomes effective, the adverse impact of these increases have been minimized. Additionally, *all of the provisions in the Act have been analysed on the basis of their projected*

costs in relation to the anticipated benefit to the employee participant.

H.R. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* Legislative History at 2348 (emphasis added). This purpose to place reasonable limits on the costs and administrative burdens faced by employers in implementing ERISA's reforms was repeatedly emphasized in floor debates on the Bill. As noted by Senator Nelson:

> In all its deliberations and decisions, Congress was acutely aware that under our voluntary pension system the cost of financing pension plans is an important factor in determining whether a pension plan will be adopted. Unduly large increases in cost can impede the progress of the private pension system. For this reason, in the case of those requirements which add to the cost of financing pension plans, Congress tried to adopt provisions which strike a balance between providing a meaningful protection for the employees and keeping costs within reasonable limits for employers.

102 Cong. Rec. S15762 (daily ed. Aug. 22, 1974).[2]

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[2] *See also* 102 Cong. Rec. S15,753-754 (daily ed. Aug. 22, 1974) ("We know that new pension plans will not be adopted and that existing plans will not be expanded and liberalized if the costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would hurt rather than help the employees for whose benefit the legislation is designed. So it is no accident that the additional costs of the new requirements are generally very moderate") (Statement of Senator Long); 102 Cong. Rec. H1149 (daily ed. Feb. 26, 1974) ("[S]ince these plans are voluntary on the part of the employer and both the institution of new pension plans and increases in benefits depend upon employer willingness to establish or expand a plan, it is necessary to take into account additional costs from the standpoint of the employer") (Statement of Representative Ullman); 102 Cong. Rec. H1160 (daily ed. Feb. 26, 1974) ("Each regulation has to be weighed against the burdens and pressures it imposes on the system. Each requirement has to be weighed against the cost increase which might result") (Statement of Representative Perkins); 102 Cong. Rec. H1168 (daily ed. Feb. 26, 1974) ("[Congress'] primary concern was in tightening the existing standards for qualified plans while at the same time continuing to encourage voluntary participation in such plans. As a result, the Committee found it necessary to strike a very delicate balance between what we felt companies with pension plans should do and what they were willing to do, since no employer can be compelled to offer any plan at all.") (Statement of Representative Rostenkowski).

The balance struck by Congress in its comprehensive reform of the entire employee benefit system simply makes no provision for the supplemental remedies which the Ninth Circuit decision would make available. Indeed, punitive or extra-contractual damages are nowhere mentioned either in ERISA or its extensive legislative history, much less analyzed on the basis of "their projected costs in relation to the anticipated benefit to the employee participant." Moreover, as demonstrated in petitioners' brief, their availability not only could deter employers from establishing employee benefit plans, but also would lead to substantial increases in the costs of maintaining such programs by, among other things, effectively negating the operation of the internal appeals procedures which Congress mandated. In view of Congress' sensitivity to unnecessary costs and its desire to encourage expansion of voluntary employee benefit plans, it is inconceivable that Congress "absent-mindedly forgot to mention an intended private action" for such remedies.[3] *See Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S., 11, 20 (1979).

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[3] This conclusion is buttressed by the fact that around the time of ERISA's passage in 1974, Congress expressly included punitive damages provisions in some 11 different federal statutes. *See* Financial Institutions Regulatory and Interest Rate Control Act of 1978 § 1117(a), 12 U.S.C. § 3417 (1982); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 88 U.S.C. § 2520 (1982); Tax Equity and Fiscal Responsibility Act of 1982 § 357(a)(c), 26 U.S.C. § 7431(a)(c)(1982); Deepwater Port Act of 1974 § 15(c), 33 U.S.C. § 8814(c) (1982); Civil Rights Act of 1968 § 812(c), 42 U.S.C. § 3612(c) (1982); Comprehensive Environmental Response, Compensation, and Liability Act of 1980 § 107(c)(3), 42 U.S.C. § 8607(c)(3) (1982); Railroad Revitalization and Regulatory Reform Act of 1976 § 511(j), 45 U.S.C. § 831(j) (1982); Natural Gas

II. FEDERAL COMMON LAW CANNOT SUPPLY SUPPLEMENTAL REMEDIES IN ERISA NOT AUTHORIZED BY CONGRESS

Contrary to respondent's suggestion, this Court does not have common law authority to fashion all "necessary and appropriate remedies" under ERISA. There is, of course, "no general federal common law." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (*quoting Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). Rather, the federal judiciary's authority to fashion federal common law is "subject to the paramount authority of Congress." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 95 (1981) (*quoting New Jersey v. New York*, 283 U.S. 336, 348 (1931)). As a result, except in areas of "uniquely federal interests" not here involved,[4] "federal common law [only] . . . may come into play when Congress has vested jurisdiction in the federal courts and *empowered them to create governing rules of law*." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 642 (emphasis added). Moreover, the fact that Congress evidences an intent to permit the courts to fashion federal common law to fill in the interstices of certain provisions of a statute does not similarly suggest "that Congress intended courts to have the power to alter or supplement the remedies enacted." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 645.

Pipeline Safety Act of 1968 § 12(a), 49 U.S.C. § 1679(a) (1982); Transportation Safety Act of 1974 § 111(a), 49 U.S.C. § 1810(a) (1982); Pipeline Safety Act of 1979 § 209(a), 49 U.S.C. § 2008(a) (1982); and Foreign Intelligence Surveillance Act of 1978 § 110, 50 U.S.C. § 1810 (1982).

[4] Such "uniquely federal interests" include "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of states or our relations with foreign nations and admiralty cases." Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. at 641. They do not include adjudication of private suits involving the rights and obligations of private parties, even though a federal interest in the enforcement of the underlying statutory scheme may be present. *Id.* at 641.

This rule is well illustrated in this case. Here, Congress may well have intended federal common law to be fashioned "to deal with the issues involving rights and obligations under private welfare and pension plans." 102 Cong Rec. S15751 (daily ed. August 22, 1974) (Statement of Senator Javits). ERISA itself largely leaves unregulated the substantive provisions of employee benefit plans. *See generally In re White Farm Equipment Company*, Civil Action No. C82-3209 (N.D. Ohio Sept. 20, 1984).

In contrast, the remedies available under ERISA for fiduciary breach are both detailed and specific. Such specificity "suggests a sharp distinction between the lawmaking powers conferred in defining violations [of the statute] and the ability to fashion the relief available to parties claiming injury." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 644. Thus, whatever latitude the courts may have with respect to other provisions of ERISA, "[i]t does not necessarily follow . . . that Congress intended to give courts as wide discretion in formulating remedies . . . ." *Id.* at 643. Moreover, as this Court has recognized:

> The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement . . . . The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs.

Northwest Airlines, Inc. v. Transport Workers, 451 U.S. at 97 (citations omitted). For just these reasons, this Court refused to create additional remedies beyond those provided under the statutes involved in *Northwest Airlines, Inc. v. Transport Workers, supra*,[5] and *Texas In-*

dustries, Inc. v. Radcliff Materials, Inc., supra, under the rubric of federal law. Congress' similar detail with respect to the remedies available under ERISA mandates the same conclusion.

Nor does Congress' failure to provide the remedies allegedly available for fiduciary breach under state law require a different result. The adoption of state law remedies in the manner proposed by respondent would virtually nullify Congress' intention to establish a "uniform source of law for evaluating fiduciary conduct" in ERISA.[6] *See* Introductory Statement of Senator Javits on S. 1557, *reprinted in* Legislative History at 279. The need for such uniformity was particularly acute because of the conflicting or inconsistent state regulation which previously had characterized the employee benefit plan area. As the House Report stated:

> [A] fiduciary standard embodied in Federal legislation is considered desirable because it will bring a measure of uniformity in an area *where decisions under the same set of facts may vary from state to state* . . . . [I]t is evident that the operations of employee benefit plans are increasingly interstate. The uniformity of decision which the Act is designed to foster will help administrators, fiduciaries and participants to predict the legality of proposed actions *without the necessity of reference to varying state laws.*

[5] Indeed, the "equitable or remedial relief" language of Section 409, upon which the Ninth Circuit relied for its holding, is virtually identical to Title VII of the Civil Rights Act of 1964, which was the subject of a similar effort to imply supplemental remedies under federal common law in Northwest Airlines v. Transport Workers, *supra*. In that case, this Court concluded that Title VII constituted a comprehensive legislative scheme for which supplemental remedies could not permissibly be implied. *See also* Texas Industries, Inc. v. Radcliff Materials, Inc., *supra* (no additional remedies provided under antitrust laws).

[6] The need to establish "standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans" was identified by Congress as one of ERISA's principal objectives in the Act's Findings and Declaration of Policy. ERISA Section 2; 29 U.S.C. § 1001(b) (1982).

H.R. Rep. No. 533, 93d Cong., 1st Sess., *reprinted in* Legislative History at 2359 (emphasis added). Accordingly, Congress preempted, with rare exceptions, *all* state laws which relate in any manner to employee benefit plans.[7] ERISA Section 514; 29 U.S.C. § 1144 (1982). Respondent's suggestion that Congress nonetheless intended the federal courts to imply any state remedy which Congress itself had preempted would foster the very uncertainty of decision that Congress hoped to eliminate.[8]

[7] As Senator Javits stated: "the emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required—but for certain exceptions—the displacement of State action in the field of private employee benefit programs." 102 Cong. Rec. S15751 (daily ed. Aug. 22, 1974); *see* Shaw v. Delta Air Lines, Inc., 103 S.Ct. 2890, 2901 (1983).

[8] Furthermore, although respondent would have this Court believe that the application of punitive damages remedies in the various states is uniform, the circumstances under which such remedies may be awarded vary greatly from state to state. The states have developed a variety of ad hoc tests designed to determine both the entitlement to and the amount of punitive damages, and there is little consistency in these standards. *See* Smith v. Wade, 460 U.S. 30, 60-64 (1983) (Rehnquist, J., dissenting); Ellis, Fairness and Efficiency in the Law of Punitive Damages, 56 So. Cal. L. Rev. 1, 34-37 (1982). Indeed, while California state courts appear to be fairly liberal in awarding such remedies, at least four states prohibit common law punitive damages awards altogether as a matter of public policy. *See* Killebrew v. Abbott Laboratories, 359 So. 2d 1275 (La. 1978); USM Corp. v. Maison Fastener Corp., 392 Mass. 334, 467 N.E.2d 1271 (1984); Miller v. Kinsley, 194 Neb. 123, 230 N.W.2d 472 (1975); Barr v. Intercity Citizens Bank of Tampa, 96 Wn. 2d 409, 635 P.2d 441 (1981). Congress obviously determined that such arbitrary and unpredictable enforcement was inconsistent with its objective to establish uniform application of ERISA's fiduciary principles.

III. THIS COURT SHOULD NOT IMPLY ADDITIONAL REMEDIES UNDER ERISA PURSUANT TO *CORT v. ASH* STANDARDS

Respondent's alternative contention that this Court should resort to *Cort v. Ash*, 422 U.S. 66 (1975), standards and imply a private right of action for participants and beneficiaries to recover punitive and extra-contractual damages under Section 409 also is without merit.[9] The question whether to imply a private cause of action, of course, turns on congressional intent. "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. at 94. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *California v. Sierra Club*, 451 U.S. 287, 297 (1981).

In this case, any suggestion that Congress intended to provide such an implied right of action to plan participants and beneficiaries is belied by the statute itself. As noted in connection with respondent's federal common law argument, ERISA already includes comprehensive and specific enforcement provisions which set forth the remedies Congress deemed appropriate for fiduciary breach. Those same provisions extend participants and beneficiaries the right to bring an action for "appropriate relief under § 409", but do not make punitive or extra-

[9] Respondent refuses to concede that the plain language of Section 409 authorizes relief solely on behalf of the plan itself, and not individual participants or beneficiaries. Nonetheless, Respondent can point to nothing in ERISA itself or its legislative history to refute the overwhelming evidence that Section 409 makes relief available only to plans as a whole for breaches of fiduciary duty in the management or investment of plan assets. *See* Petitioners' Brief at 11-16. Respondent thus concentrates her efforts primarily on arguing that such a cause of action should be implied under Section 409.

contractual damages available to them. Moreover respondent can point to no support in ERISA's legislative history for the implication of such additional remedies beyond the statute's general purpose of protecting plan participants and beneficiaries, a factor which, without more, "does not require the implication of a private cause of action for damages on their behalf." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979). Accordingly, since "neither the statute nor the legislative history reveals a congressional intent to create a private right of action . . . [this Court] need not carry the *Cort v. Ash* inquiry further." *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. at 94 n.31.

IV. THIS COURT SHOULD NOT REWRITE ERISA TO PROVIDE SPECIAL REMEDIES FOR SINGLE EMPLOYER PLANS

Respondent's brief argues that beneficiaries of self-administered single employer plans lack protections comparable to those found in Taft-Hartley plans and insurance funded plans. For this reason, respondent asserts that the courts should fashion special remedies to protect participants and beneficiaries of single employer plans that would not apply to the other two types of employee benefit plans. This suggestion, which amounts to little more than an invitation to rewrite ERISA, cannot withstand critical scrutiny.

Although insurance funded plans may be subject to additional regulation beyond ERISA's fiduciary and enforcement provisions, such protections are a direct result of Congress' decision to exempt state insurance law from the scope of ERISA's preemption provision. *See* ERISA Section 514(b)(2)(A), 29 U.S.C. § 1144(b)(2)(A). Thus, Congress determined that insurance companies which fund or serve as professional administrators of an employee benefit plan would remain subject to whatever

additional regulation might be imposed by the insurance laws of the several states. In contrast, ERISA's preemption provision contains no similar exception subjecting fiduciaries of single-employer plans to the vagaries of state law.[10]

Nor did Congress draw any distinction between fiduciaries of single-employer and Taft-Hartley plans in fashioning ERISA's fiduciary standards and enforcement provisions.[11] Obviously, Congress was aware that many employee benefit plans would be administered by employers themselves, rather than third parties. Nonetheless, it detected in such arrangements no inherent "conflict of interest" requiring special protections beyond those provided in the statute.[12] Indeed, Congress expressly provided that an individual could serve "as a fiduciary in addition to being an officer, employee, agent, or other

[10] Indeed, if anything, Congress' refusal to preempt state insurance law underscores the impropriety of subjecting ERISA fiduciaries to the state common law remedies advocated by Respondent. Obviously, if Congress had intended to leave such remedies intact, it knew how to do so by exempting them from the scope of ERISA's preemption.

[11] Fiduciaries of single-employer funded employee benefit plans have not, as respondent contends, been held to a higher standard of duty in processing benefit claims that Taft-Hartley trustees. The courts have consistently employed an "arbitrary and capricious" standard in reviewing the propriety of a fiduciary's decision to deny benefits to particular claimants, not only for multiemployer funds, but for single-employer and insurance funded plans as well. *See, e.g.*, Offutt v. Prudential Insurance Co., 735 F.2d 948, 950 (5th Cir. 1984); Wolfe v. J.C. Penney Co., Inc., 710 F.2d 388, 393 (7th Cir. 1983); Pompano v. Michael Schiavone & Sons, Inc., 680 F.2d 911 (2d Cir.), *cert. denied*, 459 U.S. 1039 (1982); Paris v. Profit Sharing Plan, 637 F.2d 357, 362 (5th Cir.), *cert. denied*, 454 U.S. 836 (1981).

[12] Congress relied instead on the fact that ERISA codified the strict fiduciary standards of trust law for all trusts and that "the fiduciary requirements of ERISA specifically insulate the trust from the employer's interest." NLRB v. Amax Coal Co., 453 U.S. 322, 333 (1981).

representative of a party in interest" (such as an employer), without violating ERISA's conflict of interest provisions contained in Section 406, 29 U.S.C. § 1106 (1982). *See* ERISA Section 408(c)(3), 29 U.S.C. § 1108 (c)(3) (1982). And Congress provided that all employee benefit plans establish internal claims procedures. *See* ERISA Section 503; 29 U.S.C. § 1133 (1982). Thus, even if the presence of union representatives in the administration of Taft-Hartley plans did provide an additional measure of protection to plan participants and beneficiaries—a proposition not entirely free from doubt[13]—there is no basis in ERISA's plain language or legislative history for subjecting fiduciaries of single-employer plans to a differing scope of liability. In any event, if such additional remedies, in fact, were needed in this area, it would remain a question for the Congress, rather than the courts, to decide.[14] *See, e.g., Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. at 647; *Northwest Air-*

[13] The Taft-Hartley Act, of course, required *employer* representation in the management of employee benefit funds subject to its jurisdiction in order to protect against perceived abuses of such funds by unions. As the Court has noted:

> The requirement that employer and employee be equally represented among the trustees of an employee benefit fund prevents any misuse of those funds by union officers who would otherwise have sole control of vast amounts of money contributed by the employer. The management-appointed trustee "represents" the employer only in the sense that he ensures the union-appointed trustee does not abuse his trust with respect to the funds contributed by the employer.

NLRB v. Amax Coal Co., 453 U.S. 322, 330 (1981) (citations omitted.)

[14] Indeed, acceptance of respondent's suggestion would have the inevitable effect of increasing the cost of administering many employee benefit plans in a manner Congress could not have intended. Faced with the prospect of unpredictable liability, many employers would forego self-administration in favor of third party professional administrators. Moreover, since ERISA Section 404 specifically permits administrative fees to be paid from assets of the plan, the additional costs of such administration ultimately would be borne by the participants and beneficiaries themselves.

lines, Inc. v. Transport Workers, 451 U.S. at 98; *United States v. Topco Associates*, 405 U.S. 596, 611-612 (1972); *United States v. Gillman*, 347 U.S. 507, 511-513 (1954).

CONCLUSION

ERISA is a "comprehensive and reticulated statute," *Nachman v. PBGC*, 446 U.S. 359, 361-62 (1980), designed to provide uniform law for regulating employee benefit plans. Consistent fiduciary standards and enforcement provisions are crucial to this goal. Far from immunizing fiduciaries from liability for misconduct, ERISA subjects them to a wide range of stringent statutory remedies including personal liability for breach of fiduciary duty and civil and criminal sanctions. That Congress chose not to include punitive and compensatory damages is evident from its failure to even mention these remedies in the statute or its extensive legislative history and from the specific detailed enforcement remedies it did provide. In arguing that such additional remedies should be implied, respondent has suggested little more than broad policy arguments that would be better addressed to the Congress than to this Court.

For these reasons, the Court should reverse the ruling of the Ninth Circuit in this case.

Respectfully submitted,

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